85-1059

No.

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In Re GRAND JURY INVESTIGATION, 84-2,

UNITED STATES OF AMERICA,

Respondent,

v.

JOHN DOE,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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40 pp

QUESTIONS PRESENTED

1. Whether a district court has jurisdiction to compel a target of a grand jury investigation to execute a form authorizing foreign banks to disclose records of accounts over which he has the right of withdrawal when the grand jury has not directed him to execute the form and the government has not sought to obtain the records by enforcing subpoenas issued by the grand jury to the foreign banks.

2. Whether compelling a target of a grand jury investigation to execute a form authorizing foreign banks to disclose records of any and all accounts over which he has the right of withdrawal violates the target's Fifth Amendment privilege against self-incrimination.

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No.

In Re GRAND JURY INVESTIGATION, 84-2
UNITED STATES OF AMERICA,
Respondent,

v.

JOHN DOE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner John Doe respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 8, 1985.

OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the appendix hereto. (App. 1a).

JURISDICTION

The Court of Appeals entered judgment on October 8, 1985, and denied rehearing on November 12, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The All Writs Act, 28 U.S.C. § 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. U.S. Const. amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

John Doe is a target of a grand jury investigation inquiring into possible federal offenses arising from the alleged fraudulent manipulation of oil cargos and the accumulation of unreported income. On October 5, 1983, the grand jury issued two subpoenas to Doe for all records in his possession and control of personal and corporate foreign bank accounts over which he had signatory authority. Doe complied with the subpoenas by appearing before the grand jury and producing his bank records. He confirmed in testimony before the grand jury that no additional records responsive to the subpoenas were in his possession or control. When asked questions concerning the pos-

sible existence and location of responsive documents not in his possession or control, Doe asserted his Fifth Amendment privilege against self-incrimination. (App. 13a). The grand jury did not seek to compel further compliance with the subpoenas.

Eight months after Doe's appearance, the government sought an order compelling Doe to sign forms that would authorize two Cayman Islands and one Bermuda bank to disclose records of accounts over which Doe had the right of withdrawal. The government submitted twelve proposed consent forms, one for each account of which it sought records, noting the name of the account and the account number. Doe contested the motion, contending (1) that the district court lacked jurisdiction to compel him to execute the consents because the grand jury had not subpoenaed him to appear and execute the consents and (2) that compelling Doe to execute the consents would violate his Fifth Amendment privilege against self-incrimination.

Meanwhile, the government served grand jury subpoenas on the U.S. branches of the three foreign banks demanding production of the records described in the consents. The banks declined to comply with the subpoenas, citing provisions of the bank secrecy laws of the Cayman Islands and Bermuda. The government has not sought to enforce these subpoenas.

On December 6, 1984, the district court denied the government's motion to compel Doe to execute the consents. The court rejected Doe's argument that it lacked jurisdiction and ruled that it could consider the motion because Doe had failed to produce records of certain of the accounts in response to the grand jury subpoenas previously served on him. (App. 13a). The

court then held on the merits that requiring Doe to execute the consents would violate the Fifth Amendment by compelling him to perform the testimonial act of admitting the existence of the records sought by the grand jury and his signatory authority over the foreign bank accounts. (App. 16a).

The government moved for reconsideration and submitted a revised consent form. (App. 8a). The government also submitted an affidavit of an IRS special agent summarizing certain information in the government's possession relating to foreign bank accounts over which the government believed Doe to have signatory authority. The affidavit averred that the government had linked eleven accounts to Doe based on Doe's filings with the Internal Revenue Service or the records Doe had previously produced to the grand jury. The affidavit further averred that the government knew of a twelfth account, in the name of the XYZ Co., which it suspected but could not prove to be connected to Doe.

The district court denied the government's motion for reconsideration. (App. 6a). It recognized that the government had information connecting Doe to some foreign bank accounts, but it found that the sweeping consent sought by the government would compel Doe to acknowledge the existence of, and his connection to, accounts about which the government lacked information. (App. 8a). The court also found as a fact that, in the absence of the consent, the government had no evidence to support its suspicion that Doe had signatory authority over the XYZ Co. account. (App. 7a). Thus, the court ruled that requiring Doe to execute the consent would provide the government with testimonial and potentially incriminating information.

The Government appealed to the United States Court of Appeals for the Fifth Circuit. In his responsive brief on appeal, Doe reiterated his argument that the court lacked jurisdiction to grant the motion. The government, tacitly acknowledging that the district court's rationale for asserting jurisdiction was invalid, argued for the first time in its Reply Brief that the All Writs Act, 28 U.S.C. § 1651, empowered the district court to compel Doe's consent in aid of its jurisdiction over the subpoenas issued to the banks. In an unpublished *per curiam* decision, the Fifth Circuit accepted the All Writs Act as the basis for the district court's jurisdiction and reversed the district court's ruling that compelling Doe to execute the consent would violate his Fifth Amendment privilege. (App. 2a-3a).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Holding On The Jurisdiction Issue Improperly Expands The Scope Of The All Writs Act.

This action warrants review because the Court of Appeals' reliance on the All Writs Act, 28 U.S.C. § 1651, as a basis for the district court's jurisdiction over Doe dramatically and improperly expands the scope and application of that statute. The real dispute in this case is between the government, which wants the banks' records of Doe's accounts, and the banks, which have declined to produce the records. Doe is not a party to this dispute, and his consent to disclosure is unnecessary and, in all likelihood, irrelevant, to the resolution of the dispute between the government and the foreign banks. The Court of Appeals was incorrect in ruling that the All Writs

Act somehow gave the district judge jurisdiction to compel Doe's consent to aid the enforcement of the subpoenas served on the foreign banks.

The All Writs Act is not a plenary grant of power to federal district courts that overrides the case or controversy requirement or traditional concepts of justiciability. Although a court may invoke the Act to compel action from a person who is not a party to any case or controversy before it to aid its existing jurisdiction, *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), the Act is a tool of last resort; it can be invoked only if the court cannot otherwise exercise its jurisdiction over the actual parties to the dispute. *See United States v. New York Telephone Co.*, 434 U.S. 159, 189 (1977) (Stevens, J., dissenting); *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289-90 (9th Cir. 1979); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978).

Invocation of the All Writs Act as a basis for compelling Doe's consent is not necessary to aid the district court in exercising its jurisdiction over the banks. The court may order a foreign bank to produce records, notwithstanding the fact that production would violate the bank secrecy laws of its domicile.[1] Moreover, compelling Doe's consent will not aid the exercise of the district court's jurisdiction; under British

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[1]*See, e.g., In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 105 S.Ct 775 (1985); *In re Grand Jury Proceeding (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1290-91 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *In re Grand Jury Proceedings (Field)*, 532 F.2d 404, 410 (5th Cir.), *cert denied*, 429 U.S. 940 (1976).

common law, which is recognized in the Cayman Islands and Bermuda, a purported "consent" that is compelled by a court order is invalid and a nullity.[2] Thus, the banks will be no more free to produce the records in reliance on the compelled consent than they were to produce them without the consent. In order to obtain the records, the government will still have to enforce the subpoenas to the banks by seeking contempt sanctions against the banks.

The district judge was clearly incorrect in ruling that he had jurisdiction to compel Doe's consent by virtue of the subpoenas previously served on Doe. Doe produced all bank records in his custody or control in response to the subpoenas served on him.[3] The grand jury did not subpoena Doe to appear and execute the consent. Until there has been a valid demand by the grand jury, a district court lacks jurisdiction to order him to comply with a prosecutor's wishes. *See In re Melvin,* 546 F.2d 1, 4 (1st Cir. 1976); *United States v. O'Kane,* 439 F. Supp. 211, 215 (S.D. Fla. 1971).

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[2]*See In re ABC Ltd.,* No. 269-1984 (July 24, 1984 Grand Ct. Cayman Islands) (attached by the district court as an exhibit to its Order denying the motion to compel, *see* App. 17a); *Tournier v. National Provincial and Union Bank of England,* 1 K.B. 461 (1924).

[3]The district court incorrectly ruled that it had jurisdiction because Doe had failed to produce the banks' records in response to the 1983 subpoenas. (App. 13a). It is undisputed that Doe complied with the 1983 subpoenas, and the Government did not rely on, or even allude to, the district court's rational when it argued jurisdiction on appeal.

II. The Compelled Consent Procedure Presents A New And Provocative Constitutional Question.

This Court should grant review in this action because the compelled consent procedure sanctioned by the court below presents an important and novel issue of Fifth Amendment jurisprudence. On one hand, this Court has interpreted the privilege against self-incrimination as prohibiting the government from compelling a witness to produce personal business or financial documents if the act of production would compel the witness to admit tacitly the existence of the records and that he possessed them. *United States v. Doe,* 465 U.S. 605 (1984). On the other hand, the Fifth Amendment does not prevent the government from compelling an individual to produce "real or physical" evidence that is not actually or implicitly testimonial. *See, e.g., Schmerber v. California,* 384 U.S. 757 (1966).

The "compelled consent" issue raised in this appeal is not strictly analogous to *Doe* or *Schmerber,* nor can it be resolved on the basis of this Court's other decisions concerning the privilege against self-incrimination. The government is not trying to compel Doe to produce his records; rather, it wants to compel him to authorize the banks to produce their records of his accounts. Requiring Doe to sign the consent would obviously compel him to provide the government with more than mere physical evidence, since the consent contains a declarative statement which the government wants Doe to adopt and acknowledge as true. The unanswered question is whether Doe's compelled adoption of that statement would entail a testimonial act that the government could use, in the grand jury or at trial, to incriminate Doe.

The consent is testimonial because it will add to the "sum total" of the government's information. *See Fisher v. United States,* 425 U.S. 391, 411 (1976). By signing the consent, Doe will confirm the government's suspicion that he is connected to the XYZ Co. account; he will acknowledge his control over foreign bank accounts unknown to the government; and he will provide a means by which the government could authenticate all of the records produced by the banks. Unlike the act of production involved in *Doe,* the testimonial acts in this case will not occur when Doe signs the consent. But the moment a bank produces records in response to the consent, the consent becomes a potentially incriminating admission by Doe of information not now known to the government. The Court of Appeals thus confused the issue of whether the consent is testimonial with the issue of when it is testimonial. That the testimony inherent in the consent is latent, arising at the time of the production of the records, ought not vitiate the privilege.

A clear example of the consent's latent testimonial content arises in connection with the XYZ Co. account, which the government suspects, but cannot prove, is connected to Doe. If Doe has the right to withdraw funds from this account, the bank will produce the records of the account upon receipt of the consent. Once the records are produced, the signed consent will become testimonial evidence tantamount to an admission by Doe that he has signatory authority over the account. If the records of the XYZ account show no connection to Doe, the consent might be the only evidence linking Doe to the account.

Aside from the XYZ Co. account and the eleven other bank accounts listed in the special agent's affidavit, there may be other accounts, unknown to the government, over which Doe has control. If records of such accounts were produced in response to the consent, the signed consent would amount to an admission by Doe that he had the right to withdraw funds from these accounts. An act by which the target of a grand jury investigation implicitly confirms that he is connected to an entity or bank account is testimonial if the government was not previously aware of such a connection. *See In re Katz,* 623 F.2d 122 (2d Cir. 1980).

The consent also has latent testimonial content because it would provide a means by which the government could authenticate the bank records for purposes of introducing them into evidence against Doe. Under Rule 901, Fed. R. Evid., documents proffered at trial must be authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." The government could authenticate the bank records obtained in response to the consent as records of accounts over which Doe had signatory authority by introducing into evidence the signed consent and the testimony of the government agent who received the records after delivering the consent to the banks. *See United States v. Brown,* 688 F.2d 1112, 1116 (7th Cir. 1982); *United States v. Plesons,* 560 F.2d 890, 893 (8th Cir.), *cert. denied,* 434 U.S. U.S. 966 (1977).

The compelled consent mechanism also warrants review because of the vague and all-inclusive language of the consent. This Court should infer from the fact that the consent extends beyond accounts known to

the government that one of the government's purposes is to learn about accounts connected to Doe of which it is unaware. In *Doe,* this Court relied on the sweeping language of the subpoena in ruling that the witness's compliance would entail an incriminating testimonial act. *See* 465 U.S. at 613-14, n.12, *quoting* 680 F.2d at 335. Rather than solve the latent Fifth Amendment problem, the broad, hypothetical wording of the consent reveals a transparent attempt by the government to require Doe to become the "primary informant" against himself. "It is precisely this sort of fishing expedition that the Fifth Amendment was designed to prevent." *United States v. Fox,* 721 F.2d 32, 38 (2d Cir. 1983).

This Court has denied review in one compelled consent case. *United States v. Ghidoni,* 732 F.2d 814 (11th Cir. 1984), *cert. denied,* 105 S.Ct 328 (1985). The issues in *Ghidoni* were not as clear-cut as in this case. The district judge found as a matter of fact in this case that the government lacks evidence to establish a connection between Doe and the XYZ Co. account, and that the signed consent may, once the records are produced, provide the incriminating link between Doe and that account.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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December, 1985

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2373
Summary Calendar

IN RE GRAND JURY INVESTIGATION, 84-2
UNITED STATES OF AMERICA,

Appellant,

versus

JOHN DOE,

Appellee.

Appeal From The United States District Court
For The Southern District of Texas

Before: REAVLEY, TATE and HILL, Circuit Judges.

PER CURIAM:*

The district court denied a motion, brought by the U.S. Attorney as part of a grand jury investigation, to compel defendant John Doe to sign a consent to the production of bank records. The government has

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appealed this denial, and Doe has appealed the district court's determination that it had jurisdiction to consider the motion. We agree that the district court had jurisdiction, but we reverse the denial of the motion to compel.

The threshold issue on appeal is Doe's claim that the district court lacked jurisdiction to consider the government's motion to compel. Doe relies principally on *In re Melvin*, 546 F.2d 1, 4-5 (1st Cir. 1976), and *United States v. O'Kane*, 439 F.Supp. 211, 215 (S.D. Fla. 1971), which both held that it was improper for a district court to consider a motion to compel made as part of a grand jury investigation when the U.S. Attorney made the motion on his own initiative without formal action by the grand jury. The circumstances present in *Melvin* and *O'Kane*, however, are different from those in this case. The motions in *Melvin* and *O'Kane* had no connection to any specific directive issued by a grand jury. Here, the opposite is true. The government's motion was made to aid the enforcement of a grand jury directive: subpoenas served on the banks.

While a district court unquestionably has jurisdiction over any direct action taken to enforce subpoenas issued by grand juries, it also has the power to issue orders which would *aid* its enforcement of such subpoenas. All Writs Act, 28 U.S.C. § 1651(a) (1966). That power "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of the court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376, ____(1977). Since the

banks will not readily release any records relating to Doe without his consent, he is in a position to frustrate the grand jury's investigation. Compelling him to sign the consent would facilitate the enforcement of the subpoenas served on the banks. Under these circumstances, it was appropriate for the district court to consider the motion to compel.

The second issue on appeal is whether the district court properly denied the government's motion to compel. The district court found that compelling Doe to sign the consent form would violate his Fifth Amendment rights because the consent would have testimonial significance. In *United States v. Juan Antonio Cid-Molina*, No. 85-4271, slip op. at 6170 (5th Cir. July 30, 1985), however, we recently found that signing a virtually identical consent form did not have testimonial significance for the same reasons. We hold, therefore, that the district court erred by refusing to grant the government's motion and reverse.

REVERSED and REMANDED.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2373

IN RE: GRAND JURY INVESTIGATION, 84-2
UNITED STATES OF AMERICA,

Appellant,

versus

JOHN DOE,

Appellee.

Appeal from The United States District Court
For The Southern District of Texas

FILED
November 12, 1985

UNITED STATES
DISTRICT COURT
DISTRICT OF TEXAS

ON PETITION FOR REHEARING
(November 12, 1985)

Before REAVLEY, TATE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: GRAND JURY INVESTIGATION

FILED
April 17, 1985

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
By _____Deputy

ORDER

Pending before the Court is the Government's Motion to Reconsider this Court's prior Order. In that Order, this Court denied the government's motion to compel the respondent to execute consent forms which would allow three foreign banks to supply the government with bank records, thereby circumventing the foreign government's secrecy laws.

In the present motion, the government has attached a revised proposed consent form which the government indicates was approved in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 328, 83 L.Ed.2d 264 (1984).[1] Ad-

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[1]Although this Court indicated that [had respondent] "been compelled to sign the consent forms propounded by the government, several tex-

ditionally, the government presents in its motion to reconsider an affidavit of the Internal Revenue agent which outlines various transactions occurring within and between foreign bank accounts located in the three banks referred to in the government's motion to compel. Apparently, most of these accounts were identified by Doe in a statement to the United States Treasury, or in response to the subpoena *duces tecum* issued by the grand jury. However, the government admits that as to at least one of the known accounts of which it [the government] seeks bank records,[2] there exists only speculation as to Doe's involvement with the account.

This Court recognizes that respondent, through his own admissions, vitiated any fifth amendment argument as to the foreign accounts that were revealed to contain his name. In essence, has made the existence, possession or control, and authentication of certain foreign accounts a "foregone conclusion." *See United States v. Doe,* ___U.S. ___, 104 S.Ct. 1237, 1241 (1984); *Fisher v. United States,* 425 U.S. 391, 411 (1976); *see also United States v. Brown,* 688 F.2d 1112, 1116 [documents which were voluntarily produced and implicitly represented as the records sought cannot be regarded as not authenticated]. While this

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tual changes would have been required," this Court had no intention of indicating that if a proposed consent form was presented that complied with *Ghidoni,* this Court's opinion would have differed. *In Re Grand Jury Investigation John Doe,* ___F. Supp. ___, n.3 (S.D. Tex. 1984) (Misc. No. H-84-242). Rather, the textual changes referred to in the prior Order were in reference to all the facts and circumstances surrounding this case, including the recent Cayman Island decision cited in the opinion.

[2]Account number—in the name of [XYZ Co.], located in the Bank of Nova Scotia.

Court, as well as the government, is apprised of respondent's connection with certain foreign accounts, this Court is reluctant to follow the holding in *Ghidoni*,[3] and require respondent to execute the consent form. Although respondent has conceded the existence, possession or control, and authentication of certain accounts, the government has equally acknowledged that certain accounts exist which do not indicate any connection with Doe. Therefore, assuming the foreign banks comply with the consent directive,[4] and assuming respondent is compelled to execute the consent form,[5] not only may the government ob-

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[3]In contrast to *Ghidoni*, this case involves admissions by the respondent, whereas, in *Ghidoni* the defendant denied existence of any accounts.

[4]As noted in this Court's prior Order, the Cayman Island Court issued an opinion in response to *Ghidoni* which indicated that the consent to disclose was not a "consent" within the meaning of their laws. As a result, the Cayman Island Court refused to acknowledge the consent to disclose executed by the defendant in *Ghidoni*.

[5]The "new" proposed consent form reads as follows:

DIRECTION

I, , of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in

tain a necessary link to connect Doe with the "speculative" accounts,[6] but it may also acquire documentation of accounts which it has no present knowledge exist. As stated in this Court's prior Order, "*any* records delivered pursuant to the form[s] would be records of respondent's accounts or accounts he controlled, and would be an admission that respondent exercised signatory authority over such accounts."[7] *In Re Grand Jury Investigation John Doe,*

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connection with the aforesaid investigation, dated _____. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

[6]Essentially this Court has identified three separate "sets" of accounts: (a) accounts admittedly connected with respondent; (b) accounts which the government is unable to connect with respondent ("speculative" accounts); and (c) accounts currently unknown to the government, but which may exist.

[7]Moreover, not only would execution of the consent admit signatory authority over the speculative accounts, but it would implicitly authenticate any records of the speculative accounts provided by the banks pursuant to the consent. While the government argues that since the records belong to the banks and, therefore, the respondent would not have to authenticate the records, the Court recognizes the inherent problems the government may have in summoning a foreign bank official to testify, or obtaining certification of an official of the foreign banks that the records are genuine because of the bank secrecy laws. Moreover, conceivably the government could authenticate the records by introducing the signed consent, and by providing testimony of the government agent who received the records pursuant to the consent. However, "authentication cannot be incriminating unless the contents of the document tend to incriminate." *Butcher v. Bailey,* 753 F.2d 465, 470 (6th Cir. 1985). The test to be applied, however, is whether production itself might constitute "a link in the chain of evidence needed to prosecute" the respondent. *Hoffman v. United States,* 341 U.S. 479, 486.

___ F. Supp. ___, (S.D. Tex. 1984) (Misc. No. H-84-242) (emphasis added).

In essence, although this Court's reasoning in the prior Order would not apply to the accounts which Doe admitted existed and which he controlled, this Court's statement would apply both to accounts not presently known to exist, and to the "speculative" accounts. Therefore, this Court again concludes that execution of the consent form would be a compelled testimonial communication.

Moreover, the fact remains that respondent has not been indicted.[8] While the government has respondent's admissions of some of the foreign accounts, the government only has a belief that is tied to other foreign accounts. This indicates that the government currently does not have enough information to obtain an indictment. Thus, by compelling respondent to execute the proposed consent form, he could be supplying the government with the incriminating information necessary to connect himself with alleged illegal activity, thereby subjecting himself to possible prosecution.

Accordingly, after careful consideration of the relevant law, the facts and circumstances, and the memoranda of the parties, together with the information supplied this Court by the government, this Court is of the opinion that the government's motion should be denied.

It is so ORDERED.

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[8]*Contra, Ghidoni*, 732 F.2d 814.

SIGNED AND ENTERED at Houston, Texas, on this the 27th day of April, 1985.

Carl O. Bue, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: GRAND JURY INVESTIGATION

FILED
December 6, 1984

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
By _____Deputy

ORDER

Pending before the Court is the Government's Motion to Compel Doe to Consent to Disclosure of Records by the Barclays Bank International, the Bank of Nova Scotia, and the Bank of Bermuda. Specifically, the government wants this Court to enter an order commanding respondent to execute consent forms which would allow the foreign banks to supply the government with bank records, and consequently circumvent the foreign government's secrecy laws.

After careful consideration of the relevant law, the memoranda and supplemental materials of the parties, and the facts and circumstances, this Court is of the opinion that the government's motion should be denied for the reasons discussed below.[1]

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[1]Although this Court will not compel execution of the consent forms,

On November 16, 1983, respondent was commanded to appear before the grand jury and produce records of foreign bank accounts. Specifically included in the subpoenas were records from the three foreign banks which the government now seeks this Court's assistance in obtaining through a compelled consent from respondent. Respondent produced some of the records described in the subpoenas, and testified that no further documents were in his possession or control. When questioned about the possible existence or location of additional documents, respondent invoked his fifth amendment privilege. As a result, the government filed this motion.

Respondent first asserts that this Court lacks jurisdiction to compel him to execute the consents because no controversy exists between the grand jury and respondent. In other words, respondent has complied with the subpoenas by turning over all records in his possession or control. However, this Court determines that jurisdiction exists since respondent failed to provide all documents commanded in the subpoena *duces tecum,* and instead invoked his fifth amendment privilege as to those documents he failed to produce.[2]

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other courts have ordered compelled execution of consents to disclosure in order to circumvent the foreign bank secrecy laws. *See United States v. Ghidoni,* 732 F.2d 814 (11th Cir. 1984).

[2]Additionally, a controversy exists between the foreign banks and the grand jury. The United States branches of the foreign banks refused to comply with recently served subpoena *duces tecum* which commanded the production of respondent's foreign bank records, claiming that production of any records would violate the foreign government's bank secrecy laws. Therefore, the consent also would be required in this controversy.

Respondent next asserts[3] that signing the consent would violate his fifth amendment privilege in that it would compel him to perform a testimonial act within the meaning of *United States v. Doe,* ___U.S. ___, 104 S.Ct. 1237 (1984). The government argues that the consents are analogous to a compelled handwriting exemplar, which was approved by the Supreme Court in *Gilbert v. California,* 388 U.S. 267 (1967). Moreover, the government asserts that an order compelling respondent to sign the consent forms would merely remove an obstacle to the production of bank records placed there by the respondent.

Before asserting the fifth amendment privilege in response to a subpoena *duces tecum,* three elements must be present. These elements are (1) compulsion, (2) testimonial communication, and (3) incrimination by such communication. *United States v. Authement,* 607 F.2d 1129, 1131 (5th Cir. 1979) (per curiam). The issue before the Court, therefore, is whether signing the proposed consent forms would be a testimonial communication which may incriminate respondent.

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[3]Moreover, respondent contends that his fifth amendment privilege would be violated in that he would be required to testify by affirming the statement in the proposed consent forms that he consented todisclosure of certain records. In other words, the consent would be a sworn misstatement since respondent did not consent to disclosure. This argument is without merit. *See United States v. Ghidoni,* 732 F2.d at 818, n. 7 (11th Cir. 1984). However, this Court realizes that, had Doe been compelled to sign the consent forms propounded by the government, several textual changes would have been required.

Moreover, as a side issue, in light of the recent Cayman Islands court decision, Judgment of July 24, 1984, Grand Court of the Cayman Islands Holden at Georgetown, Grand Cayman, had this Court required respondent to execute the consent forms, there is a strong indication that the Cayman banks would not comply. (See Exhibit "A" for copy of the foreign opinion).

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Whether a testimonial communication exists must be determined by the facts of each case. *United States v. Fisher,* 425 U.S. 391, 410-411 (1976). Moreover, if the act of producing supplies a necessary link in the government's evidentiary chain, the burden of establishing that the act is a compelled testimonial communication may be satisfied. In other words, "does it confirm that which was previously unknown to the government?" *United States v. Schlansky,* 709 F.2d 1079, 1084 (6th Cir. 1983). The test utilized in *United States v. Fox,* 721 F.2d 32, 38 (2nd Cir. 1983), *cert. denied,* ___U.S. ___, 104 S.Ct. 1591 (1984), was whether the compulsion of production would add to the "sum total of the Government's information."

Although the government has provided this Court with some evidence of foreign bank accounts, this Court concludes that by compelling respondent to sign the all-encompassing proposed consent forms,[4] exist-

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[4]One of the proposed consent forms is reproduced below:

I, John Doe consent to production of the following records by the Barclays Bank International, Ltd. to the United States District Court for the Southern District of Texas:

The following documents or records for each savings, checking, or other financial account (including trust accounts) maintained by Barclays Bank International, Ltd., at any of its main or branch offices in the Cayman Islands for John Doe since January 1, 1979:

1. Signature cards
2. Powers of attorney
3. Trust agreements and related documents
4. Complete ledger statements for each account from January 1, 1979 through the present
5. All checks drawn on each account from January 1, 1979 through the present in amounts exceeding $1,000 (U.S. or Cayman Islands)
6. All deposit tickets plus the items deposited with each

ence of the accounts would necessarily be admitted.[5] Moreover, any records delivered pursuant to the forms would be records of respondent's accounts or accounts he controlled, and would be an admission that respondent exercised signatory authority over such accounts.[6] In other words, the compelled consent may enable the government to obtain records which may add to its [the government's] information.

Moreover, Doe has not been indicted. While the government appears to have some evidence which has been tendered for this Court's review, the government apparently does not have enough evidence to obtain an indictment. The government admits that the grand jury is currently investigating respondent and others for various statutory violations. However, this Court maintains that by compelling respondent to ex-

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deposit ticket from January 1, 1979 through the present in amounts exceeding $1,000 (U.S. or Cayman Islands)

7. Cashier's checks or other bank checks in amounts exceeding $1,000 (U.S. or Cayman Islands) purchased with money from any of those accounts from January 1, 1979 through the present
8. Debit items for those accounts in amounts exceeding $1,000 (U.S. or Cayman Islands) from January 1, 1979 through the present.

[5]*Contra United States v. Ghidoni*, 732 F.2d at 817, n.4. This Court has determined that the proposed forms in this case contain incriminating testimony in the contents.

[6]In a subsequent proceeding, the government could argue that since respondent exercised authority over the accounts listed, he must have guilty knowledge of the contents. A witness cannot be compelled to perform a testimonial act that would entail admission of knowledge of the contents of potentially incriminating documents. *In re Grand Jury Subpoenas Duces Tecum, dated June 13, 1983, and June 22, 1983*, 722 F.2d 981, 987 (2nd Cir. 1983)

ecute the proposed consent forms, Doe may be providing the government with the incriminating link necessary to obtain an indictment. This is "precisely [the] sort of fishing expedition that the fifth amendment was designed to prevent." *United States v. Fox*, 721 F.2d at 38.[7]

Accordingly, the government's motion is denied.

It is so ORDERED.

SIGNED AND ENTERED at Houston, Texas, on this the 6th day of December, 1984.

Carl O. Bue, Jr.
United States District Judge

EXHIBIT "A"

In The Grand Court of the Cayman Islands
Holden At George Town, Grand Cayman
Cause No. 269 of 1984

Before: THE HON. SIR JOHN SUMMERFIELD CBE., Q.C., J.P., Chief Justice

In The Matter Of The Confidential Relationships (Preservation) Law, Law 16 of 1976

- AND -

In The Matter Of The Con-

[7]If, however, the government requires the foreign bank records, case law has afforded another possible remedy. *See In re Grand Jury Proceedings, The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983), *after remand*, 740 F.2d 817 (11th Cir. 1984).

fidential Relationships (Preservation) Amendment Law 1979 Law 26 of 1976

- AND -

In The Matter Of Consent Directives Executed Pursuant To Orders Of Foreign Courts

- AND -

In The Matter Of An Application By ABC LTD. Under The Confidential Relationships (Preservation) (Amendment) Law 1979.

JUDGMENT

This Summons was heard in Chambers but in view of the importance of the issue raised, it is ordered that the judgment be delivered in open court with all references to any party or to any confidential information omitted. To that end, the name of the applicant in the title is referred to as ABC LTD., instead of by its proper name. The Cause Book will be amended accordingly. All information in the Court file or otherwise relating to the proceedings remains confidential and protected and may not be divulged except by order of this Court.

The Summons seeks an order in one or more of the following terms:

1. A Direction as to whether or not the applicant can disclose confidential information to a foreign Gov-

ernmental agency pursuant to a consent signed in compliance with an order and/or Direction of a foreign Court or Tribunal.

2. A declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is not a consent sufficient to negative the application of the Confidential Relationships (Preservation) Law as amended.

3. Alternatively a declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is "a consent" sufficient to make the provisions of the Confidential Relationships (Preservation) Law as amended inapplicable.

4. A declaration as to the meaning of the word "consent" in Section 3 (2)(b) (i) of the Confidential Relationships (Preservation) Law as amended.

5. .....

The application is made in consequence of a majority decision of the United States Court of Appeals 11th Circuit No. 84-3101, United States of America, Plaintiff—appellant, decided on 2nd May, 1984 and reported in U.S. Tax Cases. In that case the unsuccessful appellant was held to be in contempt of court for refusing to comply with an order of the district court compelling him to sign a "consent directive" in the following terms:

I, LAWRENCE L. GHIDONI of the State of Florida in the United States of America do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a

bank account of any kind upon which I am authorized to draw specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto in the case of the United States of America v. Lawrence L. Ghidoni, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

The applicant, engaged in the business of banking and the management of Companies and trusts and, in that capacity, in possession and control of confidential information relating to the affairs and business of many clients, apprehends that the precedent set in Ghidoni's case may lead to an extensive use of the same process and wishes to clarify its position in relation to its own clients if one or more is or are compelled by a foreign court to sign such a consent directive. The indications are that the same process has been invoked in other courts in the United States of America.

One can begin by emphasizing the obvious, to avoid any misunderstanding, and that is what follows relates solely to the position in this jurisdiction.

Several observations may usefully be made at this stage.

The applicant's obligation and duty is to its client. The applicant might just as well be liable in damages to its client for not giving effect to a client's lawful instructions as for wrongly giving effect to them or for any other misfeasance.

So far as the terms of the consent directive under examination are concerned, the applicants would be under no obligation to the United States Department of Justice or any attorney thereof. Such a consent directive would give rise to no legal or other relationship so as to create any such obligation on the part of applicant. Neither would such a consent directive give rise to any rights in the United States Department of Justice or any attorney thereof as against the applicant. No enforceable right would be created in favour of the United States Department of Justice or any attorney thereof. The client would retain authority over the disposition of the confidential information relating to him.

The purported irrevocability of the consent directive is inoperative. The client could always revoke the instruction in it before effect had been given to them. Revocation might have dire consequences vis a vis the foreign court but this court is only concerned with the position in this jurisdiction of such a consent directive compelled by a foreign court.

The consent directive purports to have effect in relation to a bank account of a corporation upon which

the person signing the consent directive is authorized to draw. The principal in relation to such an account is the corporation itself acting through its directors or officers empowered to give authority for disclosure. This is not necessarily an officer or employee authorized to draw on the account. A comparatively junior employee could have power to draw on the account on behalf of the corporation. Only the principal can give consent.

One can turn now to the main point and that is whether consent given pursuant to an order by a foreign court under pain of criminal penalties amounts to consent for the purpose of section 3(2)(b)(i) of the Confidential Relationship (Preservation) Law 1976 as amended. It must be stressed that the only alternative to signing the consent directive ordered by the court is punishment by way of fine or imprisonment. It is signed under compulsion backed by criminal sanctions.

I am of the view that such a consent directive does not amount to consent as contemplated by section 3(2)(b)(i) and that it is ineffective for the purposes of that provisions.

In saying this I am not unmindful of the fact that this court has itself ordered directions in substantially similar terms for the purpose of enforcing an order for premature discovery and the preservation of property. Those directions were aimed at banks within the jurisdiction. It was appreciated at the time that those orders were novel and without precedent. They were not challenged--largely because they were ineffective for reasons which need not be gone into. Unfortunately the point taken in this matter was not argued when the orders were made. Had they been challenged on the grounds raised in these proceedings the

challenge may have succeeded. On reflection it may well be that it would have been better, and would have achieved the same end, had the provisions of O38 R13 of the Rules of the Supreme Court 1965 been invoked followed by an application under section 3A of the Confidential Relationship (Preservation) Law. At all events this Court was purportedly exercising its powers under the Law of England and Wales as applied by section 20 of the Grand Court Law in relation to entities within its jurisdiction. The position may have to be reviewed in the event of a similar application coming before the court.

As it is I am satisfied that in our law, where consent is a material element giving rise to a legal consequence, it must be voluntarily and freely given in the exercise of an independent and uncoerced judgment. This is a well established principle in every sphere of our law, civil and criminal, and there is no reason to give any different meaning to the expression "consent" in section 3(2)(b)(i).

To take any other view would result in allowing a foreign court to undermine and circumvent the provisions of the Confidential Relationships (Preservation) Law. This is not only important to this country where that Law exists but would be equally important in many other common law countries which respect the principle in Tournier v. National Provincial and Union Bank of England, 1923 ALL E.R. Rep. 550, governing the duty of a bank to maintain secrecy—see Paget's Law of Banking 8th Edition p. 166 et. seq.

Although in form the consent directive purports to be a consent and direction given by the client of the bank it is in substance a direction given by the foreign

court. It is not real consent at all. In reality it is the foreign court directing the bank to disclose confidential information. In my view the Confidential Relationships (Preservation) Law does not contemplate that situation. In effect the foreign court is usurping the power to order disclosure and, in doing so, completely bypassing the section 3A procedure under that Law.

Apart from anything else, under section 3A this court can edit material that it considers should be released in the interests of justice. The editing process is an important feature in protecting confidentiality in relation to the affairs of a person in respect of whom no case for the release of confidential information has been made out.

In short, consent given under complusion is merely submission to force and is not consent for the purposes of section 3(2)(b)(i).

On the face of it, the consent given in Ghidoni's case is consent given under complusion and does not amount to consent for the purposes of our law.

Accordingly, there will be a declaration in terms of paragraph 2 of the summons.

The declaration in relation to paragraph 1 is in the negative.

It follows that a declaration in relation to paragraph 3 does not arise.

The declaration in relation to paragraph 4 is implicit in those in relation to paragraphs 1 and 2.

SIR JOHN SUMMERFIELD

24th July, 1984.

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1059

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1059

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's orders denying the government's motion to compel petitioner to consent to disclosure of foreign bank records.

1. Petitioner is a target of a grand jury investigation in the Southern District of Texas. On November 16, 1983, petitioner appeared before the grand jury pursuant to a subpoena commanding production of records in his possession and control for foreign bank accounts in the Cayman Islands and Bermuda, countries with bank secrecy laws that generally prohibit disclosure of account records unless the customer consents to such disclosure (Pet. App. 12a-13a). Petitioner produced some of the subpoenaed records and testified that no other records were in his possession or control (*id.* at 13a). In response to questions about the existence or location of additional documents described in

the subpoena, petitioner asserted the Fifth Amendment privilege against compelled self-incrimination (Pet. App. 13a).

On July 2, 1984, the government filed a motion requesting the district court to order petitioner to consent to disclosure of any bank records relating to accounts held or controlled by him at three foreign banks. In connection with that motion, the government submitted proposed consent forms for each of twelve foreign accounts, specifying the account numbers and describing the records requested in the precise language of the subpoena previously issued to petitioner (Pet. App. 15a-16a n.4). The government then served subpoenas on domestic branches of the three foreign banks, but the banks refused to comply with the subpoenas absent petitioner's consent (*id.* at 13a n.2).

On December 6, 1984, the district court denied the government's motion (Pet. App. 12a-24a). The government then moved for reconsideration, submitting a consent form substantially identical to the one approved in *United States* v. *Ghidoni*, 732 F.2d 814 (11th Cir. 1984), cert. denied, No. 84-270 (Oct. 29, 1984). On April 17, 1985, the district court, declining to follow *Ghidoni*, denied the government's motion for reconsideration (Pet. App. 6a-11a). While recognizing that petitioner, "through his own admissions, vitiated any fifth amendment argument as to the foreign accounts that were revealed to contain his name" and that "[i]n essence, [petitioner] has made the existence, possession or control, and authentication of certain foreign accounts a 'foregone conclusion' " (*id.* at 7a (citation omitted)), the court reaffirmed its previous conclusion (*id.* at 15a-17a) that the execution of a consent form would amount to a compelled testimonial communication.

The court of appeals reversed the district court's orders (Pet. App. 1a-3a). The court of appeals first concluded that the All Writs Act, 28 U.S.C. 1651(a), authorized the district

court to entertain the government's motion, because compelling petitioner to execute the consent form "would facilitate the enforcement of the subpoenas served on the banks" (Pet. App. 3a). On the merits, the court of appeals, citing its recent decision in *United States* v. *Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985), concluded that the consent form had no testimonial significance and, therefore, compelling petitioner to sign the form would not violate his Fifth Amendment rights (Pet. App. 3a).

2. Petitioner challenges both the jurisdiction of the district court to entertain the government's motion and the court of appeals' ruling that compelling him to sign the consent form would not violate the Fifth Amendment. Whatever the merits of petitioner's contentions, they are not now ripe for review by this Court.[1] The court of appeals' decision places petitioner in exactly the same position he would have occupied if the district court had ordered him to execute the consent form, but had not yet held him in contempt for failure to do so. In these circumstances, the court of appeals' decision is not final, and petitioner should not be permitted to frustrate the grand jury's investigation any longer. See *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). If petitioner chooses to resist the court of appeals' order and the district court holds him in contempt, he will be entitled to present his claims at that time. Accordingly, review by this Court of the court of appeals' decision would currently be premature.[2]

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[1]It is now more than 18 months since petitioner was first asked to sign the consent form, and the grand jury still does not have all the records it seeks. Interlocutory review at this time would cause additional delay in the grand jury's investigation.

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986